

the Securities Investor Protection Corporation (SIPC) created under the Securities Investor Protection Act of 1970 (SIPA)(15 U.S.C. 78aaa *et seq.*, as amended). The amount that the net worth of a nonbank trustee that is a member of SIPC must exceed is reduced by two percent for purposes of paragraph (e)(5)(ii)(B)(2), and one percent for purposes of paragraph (e)(5)(ii)(C)(2), of the value of assets (determined on an account-by-account basis) held for the benefit of customers (as defined in 15 U.S.C. 78fff-2(e)(4)) in fiduciary accounts by the nonbank trustee to the extent of the portion of each account that does not exceed the dollar limit on advances described in 15 U.S.C. 78fff-3(a), as amended, that would apply to the assets in that account in the event of a liquidation proceeding under the SIPA.

(2) The provisions of this special rule for assets held in fiduciary accounts by members of SIPC are illustrated in the following example.

Example: (a) Trustee X is a broker-dealer and is a member of the Securities Investor Protection Corporation. Trustee X also has been approved as a nonbank trustee for individual retirement accounts (IRAs) by the Commissioner but not as a passive nonbank trustee. Trustee X is the trustee for four IRAs. The total assets of each IRA (for which Trustee X is the trustee) as of the most recent valuation date before the last day of Trustee X's taxable year ending in 1995 are as follows: the total assets for IRA-1 is \$3,000,000 (all of which is invested in securities); the value of the total assets for IRA-2 is \$500,000 (\$200,000 of which is cash and \$300,000 of which is invested in securities); the value of the total assets for IRA-3 is \$400,000 (all of which is invested in securities); and the value of the total assets of IRA-4 is \$200,000 (all of which is cash). The value of all assets held in fiduciary accounts, as defined in § 1.408-2(e)(6)(viii)(A), is \$4,100,000.

(b) The dollar limit on advances described in 15 U.S.C. § 78fff-3(a) that would apply to the assets in each account in the event of a liquidation proceeding under the Securities Investor Protection Act of 1970 in effect as of the last day of Trustee X's taxable year ending in 1995 is \$500,000 per account (no more than \$100,000 of which is permitted to be cash). Thus, the dollar limit that would apply to IRA-1 is \$500,000; the dollar limit for IRA-2 is \$400,000 (\$100,000 of the cash and the \$300,000 of the value of the securities); the dollar limit for IRA-3 is \$400,000 (the full value of the account because the value of the

account is less than \$500,000 and no portion of the account is cash); and the dollar limit for IRA-4 is \$100,000 (the entire account is cash and the dollar limit per account for cash is \$100,000). The aggregate dollar limits of the four IRAs is \$1,400,000.

(c) For 1996, the amount determined under § 1.408-2(e)(5)(ii)(B) is determined as follows for Trustee X: (1) four percent of \$4,100,000 equals \$164,000; (2) two percent of \$1,400,000 equals \$28,000; and (3) \$164,000 minus \$28,000 equals \$136,000. Thus, because \$136,000 exceeds \$100,000, the minimum net worth necessary for Trustee X to accept new accounts for 1996 is \$136,000.

(d) For 1996, the amount determined under § 1.408-2(e)(5)(ii)(C) for Trustee X is determined as follows: (1) two percent of \$4,100,000 equals \$82,000; (2) one percent of \$1,400,000 equals \$14,000; and (3) \$82,000 minus \$14,000 equals \$68,000. Thus, because \$68,000 exceeds \$50,000, the minimum net worth necessary for Trustee X to avoid a mandatory relinquishment of accounts for 1996 is \$68,000.

(E) The applicant will determine the value of the assets held by it in trust at least once in each calendar year and no more than 18 months after the preceding valuation. The assets will be valued at their fair market value, except that the assets of an employee pension benefit plan to which section 103(b)(3)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1023(b)(3)(A)) applies will be considered to have the value stated in the most recent annual report of the plan.

(iii) *Audits.* (A) At least once during each period of 12 months, the applicant will cause detailed audits of the fiduciary books and records to be made by a qualified public accountant. At that time, the applicant will ascertain whether the fiduciary accounts have been administered in accordance with law, this paragraph, and sound fiduciary principles. The audits shall be conducted in accordance with generally accepted auditing standards, and shall involve whatever tests of the fiduciary books and records of the applicant are considered necessary by the qualified public accountant.

(B) In the case of an applicant which is regulated, supervised, and subject to periodic examination by a State or Federal agency, such applicant may adopt an adequate continuous audit system in lieu of the periodic audits required by paragraph (e)(5)(iii)(A) of this section.

(C) A report of the audits and examinations required under this subdivision, together with the action taken thereon, will be noted in the fiduciary records of the applicant.

(iv) *Funds awaiting investment or distribution.* Funds held in a fiduciary capacity by the applicant awaiting investment or distribution will not be held uninvested or undistributed any longer than is reasonable for the proper management of the account.

(v) *Custody of investments.* (A) Except for investments pooled in a common investment fund in accordance with the provisions of paragraph (e)(5)(vi) of this section, the investments of each account will not be commingled with any other property.

(B) Assets of accounts requiring safe-keeping will be deposited in an adequate vault. A permanent record will be kept of assets deposited in or withdrawn from the vault.

(vi) *Common investment funds.* The assets of an account may be pooled in a common investment fund (as defined in paragraph (e)(5)(viii)(C) of this section) if the applicant is authorized under applicable law to administer a common investment fund and if pooling the assets in a common investment fund is not in contravention of the plan documents or applicable law. The common investment fund must be administered as follows:

(A) Each common investment fund must be established and maintained in accordance with a written agreement, containing appropriate provisions as to the manner in which the fund is to be operated, including provisions relating to the investment powers and a general statement of the investment policy of the applicant with respect to the fund; the allocation of income, profits and losses; the terms and conditions governing the admission or withdrawal of participations in the funds; the auditing of accounts of the applicant with respect to the fund; the basis and method of valuing assets held by the fund, setting forth specific criteria for each type of asset; the minimum frequency for valuation of assets of the fund; the period following each such valuation date during which the valuation may be made (which period in usual circumstances may not exceed 10

business days); the basis upon which the fund may be terminated; and such other matters as may be necessary to define clearly the rights of participants in the fund. A copy of the agreement must be available at the principal office of the applicant for inspection during all business hours, and upon request a copy of the agreement must be furnished to the employer, the plan administrator, any participant or beneficiary of an account, or the individual for whose benefit the account is established or that individual's beneficiary.

(B) All participations in the common investment fund must be on the basis of a proportionate interest in all of the investments.

(C) Not less frequently than once during each period of 3 months the applicant must determine the value of the assets in the fund as of the date set for the valuation of assets. No participation may be admitted to or withdrawn from the fund except (1) on the basis of such valuation and (2) as of such valuation date. No participation may be admitted to or withdrawn from the fund unless a written request for or notice of intention of taking such action has been entered on or before the valuation date in the fiduciary records of the applicant. No request or notice may be canceled or countermanded after the valuation date.

(D)(1) The applicant must at least once during each period of 12 months cause an adequate audit to be made of the common investment fund by a qualified public accountant.

(2) The applicant must at least once during each period of 12 months prepare a financial report of the fund which, based upon the above audit, must contain a list of investments in the fund showing the cost and current value of each investment; a statement for the period since the previous report showing purchases, with cost; sales, with profit or loss; any other investment changes; income and disbursements; and an appropriate notation as to any investments in default.

(3) The applicant must transmit and certify the accuracy of the financial report to the administrator of each plan participating in the common investment fund within 120 days after the end of the plan year.